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**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 98 of 2010

**BETWEEN : AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED**

Judgment Creditor

AND : HON. LASIKE

Judgment Debtor

AND : THE KINGDOM OF TONGA

Garnishee

BEFORE THE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mr R. Stephenson for the Judgment Creditor
Mr W.C. Edwards SC for the Judgment Debtor
✓ Mr. S Sisifa SC for the Garnishee**

**Hearing: On the papers
Date of Ruling: 10 April 2017**

RULING

[1] The judgment creditor (ANZ) obtained a judgment against the judgment debtor (Lord Lasike). ANZ applies for an order under

rec'd 10/04/17
HHC

Order. 32 Supreme Court Rules to garnishee a debt ANZ says is owing by the garnishee (the Kingdom) to Lord Lasike, in partial satisfaction of its judgment. Lord Lasike opposes the making of the order. The principal issue is whether section 8 of the Crown Proceedings Act (Cap 13) confers immunity upon the Kingdom from garnishee proceedings.

The facts and the positions of the parties

- [2] On 8 April 2016 the Court of Appeal entered judgment for ANZ against Lord Lasike (AC 12 of 2015) in the sum of TOP\$1,159,391 (inclusive of interest and costs). Since then some payments have been received by ANZ in partial satisfaction of the judgment but there remains owing, as at 6 March 2017, the sum of TOP\$1,147,191.
- [3] On 2 February 2017 I issued a declaration (the declaration) in proceedings between Lord Lasike and the Kingdom (CV 35/2015) that Lord Lasike was entitled to payment by the Kingdom of remuneration he ought to have earned as a member of the Legislative Assembly and as Speaker in the sum of TOP\$223,385. That sum has not been paid.
- [4] On 7 February 2017 the ANZ, having notice of the ruling Lord Lasike had obtained against the Kingdom, filed this application for a garnishee order seeking to garnishee all debts owing by the Kingdom to Lord Lasike up to the amount of its judgment.
- [5] On 21 February 2017 Lord Lasike filed a notice of opposition to the application based on following three grounds:

- [5.1] That the declaration made in CV 35/2015 was not coercive and did not create a debt owing by the Kingdom to Lord Lasike.
- [5.2] That the Kingdom has immunity from garnishee proceedings. The matter was put this way, 'Garnishee proceedings cannot be brought in respect of any money due or accruing due or alleged to be due or accruing due from the Crown'. In support of this submission I was referred to section 8 of the Crown Proceedings Act (section 8) and *Bank of Tonga v Fotofili* [1998] Tonga LR 69.
- [5.3] That any money due or becoming due to Lord Lasike from the Kingdom was subject to a prior obligation to pay legal fees pursuant to a Fee Payment Agreement between Lord Lasike and his Counsel Mr. Edwards.
- [6] For the Kingdom Mr. Sisifa noted that *Fotofili* is the leading authority as to the application of section 8. The Kingdom acknowledges that it is indebted to Lord Lasike. It argues that whether the Court should make a garnishee order depends upon whether *Fotofili* is correctly decided and it will abide by whatever decision that the Court deems just.

The Rules and the statutory provisions.

- [7] The Supreme Court's powers to give effect to and enforce judgments, including the power to make garnishee orders in accordance with its Rules, are contained in section 5(2) Supreme Court Act (as amended by Section 2 Supreme Court (Amendment) Act 2012).

- [8] Order. 32 Rule 1 Supreme Court Rules sets out the circumstances where garnishee proceedings may be taken. It contains no restriction on garnishee proceedings against the Kingdom and provides:

O.32 Rule 1. When garnishee proceedings available

Where:

(a) a judgment creditor has obtained a judgment or order for the payment by a judgment debtor of a sum of money exceeding \$500, and

(b) some other person within the jurisdiction (in this rule referred to as "the garnishee") owes money to the judgment debtor,

the Court may order the garnishee to pay to the judgment creditor any sum (not exceeding the amount owed by the garnishee to the judgment debtor) in full or part satisfaction of the judgment debt and costs.

- [9] Order. 32 Rule 2 sets out the form of the application. There is no challenge to the form of application in this case.
- [10] Once filed the application will be served on the judgment debtor and the garnishee who under Order. 32 Rule 3 are given an opportunity to show cause why the garnishee should not pay the sum claimed. Under Order. 32 Rule 4 a garnishee who admits the amount owing may pay that amount into Court.
- [11] The Court retains a discretion as to whether it will make a garnishee order. Order. 32 Rule 5 sets out what orders the Court may make upon its further consideration of the application and upon hearing any arguments advanced as to why the garnishee should not pay the sum claim. It provides:

O.32 Rule 5. Orders on further consideration

On further consideration of the matter:

(a) if the garnishee does not attend or the Court is otherwise satisfied that the garnishee owes the judgment debtor the amount specified, the Court may make an order absolute in Form 15.

(b) if the garnishee disputes owing the judgment debtor the amount claimed the Court may determine the matter summarily or order that it be tried and give any necessary directions therefore.

(c) if it appears to the Court that some other person claims to be entitled to the debt sought to be attached the Court may order that person to attend and give particulars of such claim, and may determine the matter summarily or order that it be tried and give any necessary directions therefore.

[12] Under Order. 32 Rule 6 any payment by a garnishee in compliance with an order made by the Court discharges the garnishee's liability to the judgment debtor to the extent of the amount paid. This is so even if the garnishee order or the judgment or order on which it is founded is subsequently set aside or reversed.

[13] This case turns on the meaning of section 8 and I will set the section out in full. It provides:

8 No execution against the Kingdom

No execution or attachment or process in the nature thereof, shall be issued against the property or revenues of the Kingdom of Tonga in any suit; but when any judgment is given against the Kingdom of Tonga, the Registrar of the Supreme Court shall give to the party in whose favour a judgment is given a certificate in the form in the Schedule to this Act.

Discussion of the grounds of opposition

That the declaration did not create a debt

- [14] Lord Lasike argues that the declaration did not create or constitute a debt or money owing from the Kingdom to Lord Lasike which could be subject to a garnishee order.
- [15] It is correct that the declaration is not coercive and cannot be enforced by Lord Lasike using the execution processes of the Court. However, to obtain a garnishee order a judgment creditor need not establish that the judgment debtor has itself obtained judgment against the garnishee. All that must be shown is that the garnishee owes money to the judgment debtor (Order. 32 Rule 1(b)).
- [16] I have no doubt that the Kingdom owes Lord Lasike money and that this ground of opposition must fail. The Kingdom has acknowledged that it is indebted to Lord Lasike. Mr. Sisifa states in his submissions:

If the Court decides....in favour of the position of the applicant/judgment creditor [that *Fotofili* is wrongly decided] then the Garnishee should pay to the judgment creditor the debt due from the Garnishee to the judgment debtor.

(my emphasis)

Bank of Tonga v Fotofili

- [17] Lord Lasike relies, here, upon section 8 and *Fotofili*.
- [18] The facts of *Fotofili* were that the Bank of Tonga obtained judgment by default against *Fotofili* and then sought to garnishee his salary as

a Noble and member of the Legislative Assembly. In that case (contrary to the position the Kingdom has taken in this case) the Kingdom asserted its immunity from garnishee proceedings relying on section 8. The Bank conceded that garnishee proceedings were an 'execution or attachment or process in the nature thereof' but argued that section 8 did not prevent it obtaining a garnishee order as the property it sought to garnishee was not the property of the Kingdom. In a short decision Lewis J rejected that submission. The kernel of his reasoning is contained in these words in his judgment:

The Solicitor-General in his submissions argues that s.8 is an unambiguous provision, and one which covers the situation in the instant case. His case is that garnishee proceedings, by definition, seek property from a party owing a debt to the Judgment Debtor. The property sought in this case, therefore, must be that of the Crown, up until the point where the money is transferred from the Kingdom to the Judgment Debtor. Since the Bank seeks to bring proceedings before this has taken place, it brings an action "...against the property or revenues of the Kingdom of Tonga..." which cannot as a result of s 8 be preferred. Salaries paid by the Crown remain "property" of the Crown pursuant to s 8 until they are paid into the employee's bank account.

[19] Mr Edwards supported the reasoning in *Fotofili* and submitted that the facts of that case were 'identical' to the facts of this case. He argued that section 8 is 'clear and unambiguous' and reflects a policy decision by the Government of Tonga to 'legislate against unforeseen events or impacts or impositions on its annual budgets or property which may place it in a situation of being unable to govern effectively or properly.' I do not accept these submissions.

[20] The issue that arises in this case is one of conventional statutory interpretation where the role of the Court is to determine the meaning of the words used in section 8 when read in their context

and in light of the purpose of the Act. Where necessary, 'strict grammatical meaning must yield to sufficiently obvious purpose' (*Crown v Schaumkel* [2012] Tonga LR 10 (CA) referring to *McKenzie v Attorney General* [1992] 2 NZLR 14, 17).

- [21] I note also the words of Viscount Simonds in *Attorney General v Prince Ernest Augustus of Hanover* (1957) 1 ALL ER 49 referred to in *Tu'itavake v Porter* [1989] Tonga LR 14:

The elementary rule must be observed that no one profess to understand any part of a statute or any other document before he has read the whole of it. Until he has done so he is not entitled to say that any part of it is clear and unambiguous.

- [22] Having considered closely the provisions of the Crown Proceedings Act and what I perceive to be its context and purpose I have arrived at the clear view that *Fotofili* is wrongly decided. My reasons are as follows.
- [23] First, as the Long Title to the Crown Proceedings Act makes clear it is an Act to make provisions for 'suits by and against the Kingdom of Tonga'. A suit is defined as 'any action or original proceedings between the parties'. In this case the application by the ANZ for a garnishee order is neither a suit nor is it founded on a suit by or against the Kingdom of Tonga. The application is based on the existence of a debt as between the Kingdom and Lord Lasike.
- [24] Consistent with the Long Title of the Act (and leaving aside section 8 for the present time) the substantive provisions of the Act are concerned with the subject matter of suits against the Kingdom (sections 4 and 5), the service of process in a suit (section 6), the rights of the parties in the suit (section 3 and 7), the obligation and

manner in which the Kingdom will make payment of a judgment obtained against it in a suit (section 9) and the Kingdom's entitlement to enforce, by execution, attachment or other process, a judgment obtained in the Kingdom's favour in a suit'(section 10). The interpretation of section 8 for which Mr. Edwards argues, which would prevent enforcement of a judgment that was neither by or against the Kingdom, is incongruous with the scheme of the Act which is otherwise homogenous.

- [25] Turning to the words of section 8, it is important to note that it does not prohibit execution or attachment processes against the Kingdom *per se* but against the 'property and revenues of the Kingdom of Tonga in any suit'. There are two points that follow from this.
- [26] First, the use of the words 'in any suit' make clear that consistent with the rest of the Act section 8 is only concerned with actions or proceedings by or against the Kingdom.
- [27] Secondly, section 8 does not impose a prohibition on execution or attachment processes except those against the 'property or revenues of the Kingdom'. In *Fotofili Lewis J* held that a debt owed by the Kingdom to the judgment debtor for salary was the property of the Kingdom until it was deposited into the judgment debtor's bank account. In my view this analysis is incorrect.
- [28] The garnishee application in *Fotofili* was not in respect of the property or revenues of the Kingdom but in respect of the judgment debtor's right to payment of a debt. The right to payment of a debt is a chose in action. The applicant for a garnishee order cannot accelerate the payment of a debt or stand in any better position as

regards the garnishee than the judgment debtor does. He 'can only obtain what the judgment debtor could honestly give him' (*Re General Horticultural Co., ex parte Whitehouse* (1886) 32 Ch. D 512 referred to in the White Book at 49/1/8). A chose in action is something that can be owned and a species of personal property. However in *Fotofili* (as in this case) the chose was not the property of the Kingdom but of the judgment debtor. It is the judgment debtor who is entitled to payment. All that the Kingdom has is an obligation to pay. Section 8 does not prohibit garnishee proceedings in such a case as the obligation of the Kingdom to pay a debt is not property of the Kingdom (although it is property of the judgment debtor) nor is it revenue of the Kingdom.

[29] Mr. Edwards submitted that section 8 was enacted to prevent impositions on the budget or the property of the Government that might place it in a position of being unable to govern. I do not accept that because the Act does not release the Kingdom from the obligation to pay judgments (however unexpected or unwelcome they may be) but provides, in sections 8 and 9, a mechanism for payment. Section 8 prevents a judgment creditor enforcing payment by execution or attachment processes against the Kingdom's property or revenues which might well hinder the performance of its functions or its relations with third parties. That consideration does not apply when the action is taken against the property of a third party.

[30] Before leaving my consideration of section 8 I should note that Mr. Stephenson argued that *Fotofili* was wrongly decided because it put section 8 in conflict with clauses 4 and 17 of the Constitution.

Those clauses in the Constitution are to the effect that all people are to be treated equally and impartially before the law. Mr. Stephenson submitted that *Fotofili* put employees of the Government in a privileged position above other employees whereby their salaries could not be garnished. For this reason he said, section 8 had to be interpreted consistently with the Constitution or declared void.

- [31] That brief summary of Mr. Stephenson's interesting submissions does not do justice to his industry in researching and advancing them but for the reasons I have already given I have formed the view, independently of the Constitutional considerations, that *Fotofili* was wrongly decided and I will not follow it. I do not therefore need to express a view on these submissions.

The fee payment agreement

- [32] As noted above, Lord Lasike argues that Mr. Edwards is entitled to payment ahead of the ANZ for legal fees that he agreed to pay pursuant to a Fee Payment Agreement with Mr. Edwards. The amount concerned is TOP\$62,810. In addition Mr. Edwards is entitled to any costs awarded to Lord Lasike in CV 35/2015 but no costs have yet been awarded.
- [33] Mr. Stephenson has conceded that the Fee Payment Agreement operates as a partial assignment of the debt owing by the Kingdom to Lord Lasike by way of charge which, to the extent of the charge, defeats attachment in favour of the ANZ. He therefore seeks that the debt owed by the Kingdom to Lord Lasike be garnished in favour

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of the ANZ subject to the prior claim of Mr. Edwards. I will make an order accordingly.

A final matter

[34] Although it was not necessary for me to have regard to it in my consideration of section 8, Mr. Stephenson highlighted the difficulties judgment creditors face to recover substantial amounts in the absence of personal bankruptcy laws in the Kingdom. The commercial community would benefit greatly from the enactment of such laws.

Result

[35] The judgment creditor's application is successful. The judgment creditor is to submit an order in Form 15 for approval by the Court.

[36] The judgment creditor is entitled to costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 10 April 2017.



A handwritten signature in black ink, appearing to be "O.G. Paulsen".

O.G. Paulsen
LORD CHIEF JUSTICE